294, "is *prima facie* their value . . . ". "Then there is the case in which the goods wrongfully seized have been afterwards returned. The cases in *Fouldes* v. *Willoughby*, (1841) 8 M & W 540 and *Harvey* v. *Pocock*, (1843) 11 M & W 740 afford a familiar illustration of the rule. The circumstances I have referred to have from very early times been considered admissible in mitigation of damages, because the plaintiff has had part satisfaction for the wrong. If the goods have been restored and the plaintiff has consented to take them back in discharge of the claim, that might be pleaded by way of accord and satisfaction: if not, it would go in reduction of the amount of damages to which the plaintiff would be entitled for the wrongful conversion."

It does not require argument to show that the amount by which the damages are reduced must be the value of the goods when returned. In the result therefore the plaintiff appears to be entitled to retain the sum for which he recovered judgment under the order of Kerwin J. It is objected that this will be to put him in a better position than if he had not been defrauded at all: and this appears to have influenced the decision of the majority of the Court of Appeal in Ontario. All that this amounts to is to recognize that fraudulent brokers have often sounder judgment than their clients as to the future course of markets. If the shares had been converted and not returned, there can be no question that the client would have been entitled to receive the proceeds of the conversion, though he himself had planned and thought he had succeeded in holding the shares until a time when the value was nothing: fortunately for the commercial community, the law has many effective forms of relief against dishonest agents: and no injustice is done if the principal benefits, as he occasionally may, by the superior astuteness of an unjust steward in carrying out a fraud.

In the course of the case a point has been made that the Assistant Master under the Acts and Rules of Procedure in Ontario had no jurisdiction to entertain this case. It has not met favour in any of the Courts below. In the Supreme Court, though it is mentioned in the factums, it was either not argued or met with little approval, for it is not mentioned in the judgment. Their Lordships see no reason for interfering with the judgment on this ground. The appeal will be dismissed and the cross appeal allowed, the judgment of Kerwin J. dated 13th June 1933 should be, restored: and the respondent should have the costs of the appeal to the Court of Appeal in Ontario and to the Supreme Court. The appellants must pay the costs of the appeal and cross appeal to His Majesty in Council. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed,
Cross-appeal allowed.

Solicitors for Appellants—*Gard Lyell & Co.*

Solicitors for Respondent—*Lawrence Jones & Company.*

[PRIVY COUNCIL]

(Appeal from the High Court, Madras.)
LORD ALNESS, SIR GEORGE LOWNDES & SIR SHADI LAL.
July 22, 1937.

M. P. M. MURUGAPPA CHETTI & ANOR.

vs.

THE OFFICIAL ASSIGNEE OF MADRAS.

[CONSOLIDATED PRIVY COUNCIL APPEAL No. 89 of 1935]

Trustee—minor's funds—entrusted by guardian for investment—misapplication by agents—acquiescence by guardian—fiduciary relationship—insolvency of agents—priority of minors' claim.

The guardian of certain minors entrusted moneys to a company as agents, for investment in other companies. The company subsequently used the funds in their own business. From time to time they furnished to the guardian accounts showing the exact disposal of the funds. To these dealings the guardian raised no objection. On the company having been adjudicated insolvent, the minors to whom the funds belonged claimed to be entitled to repayment of the funds standing to their credit with the company in priority over the claims of the company's other creditors:—

Held, that by reference to the company's subsequent dealings with the funds, no new contract between them and the guardian or variation of the original contract under which the funds were placed in their hands, could be inferred and that the doctrine of ratification could not be applied so as to turn the fund originally held by the insolvents as agents in a fiduciary capacity, into a mere deposit with them on ordinary banking terms.

Held, that the circumstance that the guardian's acquiescence in the unauthorised dealings by the insolvents might have debarred him from claiming compensation in respect of particular transactions could not affect the fiduciary position in which the insolvents stood towards the minors' funds.

Held, that the fiduciary relationship between the minors and the company having remained unchanged, the minors were entitled to payment in priority of the sum due to them. *Haridas* v. *Mercantile Bank of India Limited*, (1919) L.R. 47 I. A. 17 distinguished.

Sir Herbert Cunliffe, K.C. and *C. Sidney Smith*, for the appellants.

J. F. Roxburg, K.C. and *J. Bennett*, for the Official Assignee.

Cur. Adv. Vult.

The judgment of the Board was delivered by—

SIR GEORGE LOWNDES,—These consolidated appeals arise out of a petition presented by Murugappa Chetti and his brother Ramaswami Chetti (since deceased and now represented by his widow Minakshi Achi) in certain insolvency proceedings in the Madras High Court. The

petitioners will for convenience be referred to as the appellants. The Official Assignee of Madras represents a firm known as Ar. Ar. Sm. trading in British India and having a branch in Rangoon, who were adjudicated insolvent on the 15th July, 1925, and against whose assets the claim of the appellants is made. He will be referred to as the respondent and the Ar. Ar. Sm. firm as the insolvents.

In 1900 one Pethaperumal Chettiar, the grandfather of the appellants and manager of the joint Hindu family of which they were minor members, transferred sums totalling Rs. 76,000 to the insolvents in Rangoon. There is no formal record of the terms upon which this transfer was made and the question is in dispute before the Board. The appellants assert that it was an agency transaction under which the insolvents were to invest the money in other Chetti firms in Rangoon; the respondent, on the other hand, contends that under the original arrangement, they were at liberty either so to invest the moneys or to utilise all or any part of them in their own business.

In 1915 a partition decree was made by the Chief Court of Pudakottai, a Native State in Southern India of which the joint family were subjects. By this decree three-sixteenths of the moneys in question were allotted to the share of the appellants, and the grandfather, Pethaperumal Chettiar, was appointed guardian of their property. It is not disputed that the terms of the decree were communicated to the insolvents in Rangoon. Pethaperumal Chettiar died on the 18th September, 1918, and no guardian was appointed in his place though both the appellants were then and until shortly before the date of the insolvents adjudication minors under the law of Pudakottai. In 1919 or 1920 at the instance of Muthayya Chettiar the father of the minors, the original account in the books of the insolvents appear to have been closed and a separate account was opened in their books of the appellants' three-sixteenths share. There was then a sum of Rs. 27,000 standing to their credit which was increased to Rs. 44,503 at the date of the insolvency. The appellants by their petition claimed that these moneys were in effect a trust fund in the hands of the insolvents, and should be paid over to them with interest by the respondent in priority to the claims of other creditors which the respondent denied.

The petition was heard in the High Court by Stone, J. who upheld the claim and made an order for the payment to them of the Rs. 44,503 with further interest and costs. The respondent appealed and the learned Judges of the Appeal Court (Reilly and Burns, JJ.) varied the order of the lower Court and held that the appellants were only entitled as preferential creditors to a portion of the said amount and must prove in the insolvency for the balance along with the other unsecured creditors. Both parties have appealed to His Majesty in Council, the appellants asking for the restoration of the trial Judge's order and the respondent seeking to get rid of so much of the Appellate Court's order as gave the appellants priority in respect of a part of the fund.

The main questions in the appeal are as to the terms upon which the insolvents accepted the original sum of Rs. 76,000 in 1900, and whether the relationship so established was subsequently changed. No receipt or written acknowledgment is forthcoming. The appellants are, of course, unable to depose themselves as to the transaction and their father, Muthayya Chettiar died before the present question arose. There is however in the record, a letter from the head firm of the insolvents at Devakottai, dated the 7th of November, 1930, and addressed to the Rangoon branch, by which the latter were instructed to lend the money "to our Chetti firms," meaning clearly, as their Lordships think, other Chetti firms with whom the Rangoon branch had business dealings. Subsequent letters make it evident that this was understood to be the arrangement by the Rangoon branch; see in particular the Rangoon letters of 26th July, 1908, and 5th December, 1911.

This their Lordships hold to be confirmed by the depositions of various employees of the insolvents in Rangoon, and they have little doubt upon this evidence that the money was entrusted to the insolvents to invest in other chetti firms, and that they had no authority to employ any part of it in their own business. It is, however, clear that from a very early date they did so employ a part of the fund, and that this practice was by degrees so expanded that shortly after Pethaperumal's death Rs. 93,594 out of the monies then representing the fund was being utilised in the insolvents' business and only Rs. 38,567 was out on loan to other firms.

It is also established that the insolvents furnished accounts from time to time of their dealings with the fund showing its actual disposal and apparently without demur.

The respondent contends that if the original arrangement was merely of an agency character (as their Lordships have found) this course of dealing established a new contract between the parties by which Pethaperumal authorised the insolvents to deal with the fund in this way, or alternatively that it constituted such a ratification of their dealings with the fund that it should be held that the whole must be regarded at the date of Pethaperumal's death as merely a bank deposit with the insolvents, in respect of which

the appellants could claim no priority over other creditors. In support of the first branch of this contention the respondent's Counsel cites the judgment of Sir John Edge in *Haridas* v. *Mercantile Bank of India, Limited,* (1919) L. R. 47 I. A. 17, but their Lordships think it affords no support to the contention as in that case all that the subsequent dealings were held to establish was a term upon which the original contract was silent. Their Lordships are quite unable to agree that a new contract, or a variation of the original contract, can be proved by such means, even were the terms of the supposed new contract less vague than is suggested here. Nor do their Lordships think that the doctrine of ratification can be applied so as to turn the fund originally held by the insolvents as agents in a fiduciary capacity, into a mere deposit with them on ordinary banking terms. There is nothing whatever to show that Pethaperumal had full knowledge of the facts (see section 198 of the Indian Contract Act which admittedly applies). He was living in a remote village in a Native State in India, the accounts furnished to him were very obscure, and no attempt was made to explain to him what his agents in Rangoon were doing, or why they had so deviated from their original instructions. It is also at least doubtful whether what the agents did could be regarded under the circumstances as acts done on his behalf (see *per* Lord Maugham in *Imperial Bank of Canada* v. *Begley* (1936) 2 All E. R. 367), and it is admitted on the evidence that the insolvents charged the account in every case, whether the interest credited to Pethaperumal came from themselves or from outside investments, with the regular agents' commission, and when there was a question of loss on an investment, made it quite clear that no responsibility for any loss rested upon them.

On the whole their Lordships are satisfied that from the beginning the insolvents were with regard to the whole fund, in the position merely of agents entrusted with money to invest, and that this relationship still existed unchanged at the date of Pethaperumal's death, when they became (if indeed they had not already become, as from the date when the terms of the partition decree were communicated to them) trustees for the minors.

This was the conclusion to which the learned Judge in the lower Court came and upon which the order made by him was based. The Appellate Court, on the other hand, thought that the nature of the fund must be taken to have changed by the time of Pethaperumal's death owing to his acquiescence in the dealings by the insolvents, and that only so much of the fund as was then invested outside the insolvents' firm could be treated as a trust fund in their hands, but that *qua* the larger part of it which had been utilised in the insolvents' business there was no fiduciary relationship remaining. It is possible that the acquiescence of Pethaperumal in the unauthorised dealings by the insolvents might have debarred him from claiming compensation in any shape in respect of particular transactions—their Lordships have not to come to any conclusion as to this—but in their opinion it could not affect the fiduciary position in which the insolvents stood towards the minors' three-sixteenths share.

This should, their Lordships think, be the end of both appeals. But counsel for the respondent has contended before the Board that the appellants, in order to succeed in their claim as against the general body of creditors, must go further, and trace the fund *in specie* as in the hands of the insolvents at the date of their adjudication.

It is objected on behalf of the appellants that no such case was made in the Indian Courts, and that it ought not therefore to be allowed here.

It is obvious that if this contention had been put forward in India it would have applied to the whole fund as dealt with by the first Court, and to the portion held to be a trust in the hands of the insolvents by the Appellate Court. But beyond possibly a passing reference to the question in the judgment of Stone J., there is no discussion of it in either Court, and it is admitted that the Appellate Court did not take it into consideration at all. Their Lordships can only conclude that no serious argument on the matter was addressed to either Court. If it had been put forward their Lordships think that further investigation of the insolvents' accounts might have enabled the appellants to meet the objection, and they must therefore, in accordance with the well-established practice of the Board, refuse to go into the merits of this contention.

Under these circumstances their Lordships find it unnecessary to consider the question as to where the burden of proof lies in such a case, or as to any possible conflict between the principles enunciated in *Sinclair* v. *Brougham* (1912) A.C. 398, and the judgment of this Board in *The Official Assignee of Madras* v. *T. Krishnaji Bhat* (1933) L.R. 60 I.A. 203; 57 C.L.J. 433.

For the reasons given above their Lordships will humbly advise His Majesty that the appeal of M. P. M. Murugappa Chetti and Minakshi Achi should be allowed, that the order of the Appellate Court dated the 30th August, 1933, should be set aside and that of the lower Court dated the 9th May, 1932, restored, and that the appeal of the Official Assignee should be dismissed. The costs both in the High Court and before this Board must be paid by the Official Assignee.

Appeal of M. P. M. Murugappa Chetti allowed. Appeal of Official Assignee dismissed.

Solicitors for the Appellants M. P. M. Murugappa Chetti—*Burton, Yeates, & Hart.*

Solicitors for the Respondent, Official Assignee of Madras—*Douglas, Grant & Dold.*